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LIMITATIONS ON THE USE OF PROPERTY BY ITS OWNER.

THIS discussion is not intended to deal generally with the control which government may exercise over private property. It is, of course, recognized that the state, by virtue of its police power may, within limits which are fairly well defined, impose statutory restraints upon its use. And independently of statute, no one may employ his property in a manner or for a purpose which in itself amounts to a public nuisance as that term is commonly understood. Within these limits is the power of the owner absolute? According to the view which is probably held by the majority of the legal profession, so long as he violates no statute and commits no public nuisance, the owner of land may use it absolutely as he chooses, however much such use may injure his neighbor and however whimsical or unreasonable it may be. Indeed there is in the decisions of the courts ample ground for this opinion. Respectable authority is not wanting for the proposition that one may use his property solely to gratify malice. It has, for instance, been held that for the sole purpose of injuring his neighbor one may sink wells on his own land and by means thereof drain the sub-surface waters from adjoining lands only to be wantonly wasted, while by his malicious act the neighbor's well has been rendered useless and dry. And again that he may out of pure malevolence and with the design of shutting off light and air from the property of the neighbor erect on his own land a structure wholly devoid of use, benefit or advantage to himself.

Fortunately for the self-respect of mankind cases of this kind

are comparatively rare. The attention of the profession and of the courts is seldom drawn to the subject; and this, I think, accounts for the extreme persistence of a doctrine which in the light of modern conditions can only be regarded as archaic. The whole subject needs to be re-examined and the rule governing it brought into harmony with the spirit of our own time. That the question is not wholly academic, a glance at the digests will show. Two decisions of comparatively recent date will serve to set in sharp relief the doctrine under consideration.

In the case of Huber *v.* Merkel,[1] decided by the Supreme Court of Wisconsin in 1903, the plaintiff and defendant owned farms within one-half mile of each other, the plaintiff's farm being about twenty feet higher in elevation than that of the defendant. The plaintiff had an artesian well on his farm, bored in 1899, and the defendant had two such wells, bored in 1899 and 1900. In the immediate vicinity of the plaintiff's and defendant's farms within an area two and one-half miles wide by five miles in length, there were thirty such wells owned by farmers, all receiving their supply from the same subterranean source. All of these owners except the defendant regulated the flow from their wells so as to conserve the common supply. The defendant allowed his to flow continuously. Each of these wells gave an ample supply of flowing water for ordinary household, domestic and farm purposes, until the defendant maliciously allowed his wells to flow to their full capacity. The defendant used some of the water from his wells to supply a fish pond on his land, sold some, and intentionally and maliciously wasted the remainder by allowing it to flow and soak into the ground. The effect was to stop the flow in the plaintiff's well. Upon these facts the lower court awarded an injunction restraining the defendant from wasting the water from his wells and using the same for other than ordinary, domestic and farm purposes, and required him so to arrange his wells as to prevent the escape of water above the surface of the ground except when in actual use. This decree was reversed on appeal. The Supreme Court treated it as a case of percolating waters, rather than a subterranean stream flowing in a defined channel; and

[1] 117 Wis. 355, 94 N. W. 354.

held that the owner of the soil may deal with percolating waters as he may see fit, and as to the question of motive, declared that a property right cannot be affected or curtailed by a malicious motive

In the case of Koblegard *v.* Hale,[2] decided by the Supreme Court of West Virginia in 1906, the trustees of the Methodist Episcopal Church of Weston, W. Va., filed their bill alleging that this congregation had in course of erection a beautiful and costly church edifice in the town of Weston, adjoining the lot of land owned by the defendant Hale; that Hale becoming incensed at the erection of the church building adjacent to his property had declared that he would "get even" with the congregation by building a high board fence in front of the windows of the church building, that he would "shut out their light" and the more effectually to do so, would paint the proposed fence black on the side next to the church. The bill further averred that pursuant to these threats defendant from motives of pure malice and spite was proceeding to erect along the side of the church windows a rough, unsightly fence, twelve feet high built of plank and unhewn posts, reaching to the top of the windows, or nearly so; that its effect would be to shut out the light and air from the building; and that the fence was of no use or benefit to the defendant, but was erected purely out of malevolence and spite. The lower court awarded an injunction in accordance with the prayer of the bill. On appeal it was held that the demurrer to the bill ought to have been sustained, and accordingly the decree was reversed. The court, through Brannon, J., expressed with more or less directness the view that one may do as he pleases with his own property so long as he refrains from committing a public nuisance, and remarked that "to decide otherwise would detract from the right of property." It was further said that "the motives of one who exercises a legal right cannot be inquired into."

Relief is denied the plaintiff in these and similar cases on the ground that at common law the owner of land had the right to do the act complained of; and the question of malice is disposed of with the observation that when one exercises a legal

[2] 60 W. Va. 37, 53 S. E. 793.

right his motives are immaterial. Sometimes it is said that one may erect any lawful structure on his own land, and the courts will not inquire into his motives. However expressed the gist of the argument always is that the courts will not inquire into the motives of one who exercises a legal right, a statement, which in this unqualified form, was not even true of the English common law in the time of Lord Holt,[3] and which certainly could not be permitted to pass unchallenged in Virginia in view of the intimations of the court in two recent decisions to be presently discussed.

It is, of course, conceded that one may put his land to any lawful use and if damage necessarily results to the property of another, it is *damnum absque injuria* even though malice may to some extent have entered into the motive. But this is quite a different thing from saying that for the sole purpose of doing unnecessary injury to another he may use it in a way which can be of no benefit or advantage to himself. The cases adopting this view assume that the owner has the legal right to use his land in this way, and then proceed to argue that because he has such legal right his motives are immaterial. They overlook the fact that the legality of the supposed right may depend upon the motive and character of the use. The proposition that one may erect any lawful structure on his own land and the courts will not inquire into his motives is conceded to be sound. It is denied, however, that it is at all applicable to cases of this kind. The term *lawful* structure when so applied merely begs the question. An act which is wholly malicious, unrelieved by either utility or necessity, can never be lawful.

Generally speaking, any use made of land, which in the nature of things can be of no benefit to the owner, or any other, and which is done solely for the purpose of inflicting, and does inflict, needless and malicious injury upon an adjoining proprietor, should be regarded as an unreasonable and therefore unlawful use. Any other rule converts property into an instrument of oppression by licensing the owner to use it according to his malicious fancy. It is not for such use that government recognizes his right of property. The owner of land holds it

[3] Keble *v.* Hickringill, 11 Mod. 74; 11 East 574 n.

in our day not by virtue of his trusty bow or his strong right arm; but because society maintains a stable government capable of protecting and which does protect him in his title, possession and enjoyment. Its use for the gratification of malice is quite outside the purposes for which that protection is accorded, and therefore cannot be considered a right of property.

The world has moved since the doctrine of these cases had its birth. The extreme individualism of those early days has given place to a social consciousness and a social conscience. In all phases of life, secular as well as religious, it is now recognized that "no man liveth unto himself and no man dieth unto himself." The only thing that gives any value whatever to property, either real or personal, beyond a bare subsistence, is society. Given the environment of Robinson Crusoe, and the wealth of a Carnegie or a Rockefeller shrivels to nothing. Shall an individual be permitted to enjoy all of the benefits of society, and at the same time use the thing that society gives him as if he were the only being in the world? It does not seem that he should. The theory that he may do so, it is submitted, is based upon a misapprehension of the law. It assumes that while the moral and ethical standards of society have been advancing, the law has stood still.

THE COMMON LAW NOT A BODY OF FIXED RULES.

No question can be settled by a general appeal to the common law. That a given rule prevailed "at common law" does not necessarily mean that the same rule is law today even in the absence of legislation on the subject. One needs to know to what period the inquiry related. The common law was not and is not a fixed body of rules. It was not and is not as the law of the Medes and Persians which altereth not. It is our boast that the law is a progressive science; that it expands and develops as civilization advances, and adapts itself to the moral and ethical standards of successive generations of men.

Early law was unethical, unmoral. It dealt with the physical fact, and regarded not the intent with which it was done. It was extremely technical and formal. As late as the seventeenth century, one selling a chattel and representing it to be

of a certain quality was not liable if the article turned out to be inferior unless in making the sale he had used the formal words, "I warrant" or "I undertake." *Caveat emptor* applied not only to the quality of a chattel, but to the title as well, and that too when bought from one in possession, unless the seller expressly warranted his title.

The phrase "at common law" is therefore a variable term, its import and authority depending upon the date at which the observation was taken. At common law a husband had the right to chastise his wife in moderation; but it might not be prudent to attempt it now, although so far as it is known this sacred right has never been expressly denied him by statute.

At common law there was no obligation to pay for service rendered and accepted unless the price had been agreed upon in advance. As late as the time of Queen Elizabeth, a person of quality with a retinue of servants and horses stopped at an inn, and was there entertained, without previous understanding as to the price to be paid for the accommodation. The landlord was denied the right to recover because no price had been agreed upon in advance. This was shocking to the moral sense of the people, and shortly thereafter the judges adopted the rule that an obligation to pay what the service is reasonably worth may be implied from conduct.[4]

The whole system of equity and even the court of equity itself is the product, not of legislation, but of this effort on the part of Roman and English judges to impart to the law a moral and ethical quality and to make it conform more nearly to the standards of their own age.

It is true that Virginia adopted the English common law and made it the rule of decision in all cases "except in those respects wherein it is or shall be altered by the General Assembly," but at the same time "the right and benefit of all writs, remedial, and judicial, given by any statute or act of Parliament, made in aid of the common law prior to the fourth year of the reign of James the First," were expressly saved. This included the statute of Westminster II,[5] the chief of all of the

[4] Law and Morals, 22 HARV. LAW REV. 97.
[5] 13 Edward I, c. 24.

liberalizing agencies that have helped to mould the common law. Therefore, what Virginia adopted as the basis of her jurisprudence was not a cast-iron system of fixed rules, but a living organism capable of expansion and adaptation to the needs and spirit of a progressive society. This is recognized in Tunstall *v.* Christian,[6] which repudiated the doctrine of ancient lights, the court saying:

> "But the English doctrine of 'ancient lights' has been repudiated by the American courts as irreconcilable with principle, and not adapted to the rapid physical development of the country, especially in cities and towns. 'And in this,' says Washburn in his work on Easements, 'is witnessed another illustration of the influence of those silent agencies which are constantly at work in a free community, in adapting and giving form and consistency to the rules of its common law to meet the wants and conditions of the body politic.'"

The Use of Property.

The rules of property are persistent. For example, the ancient doctrine of the common law whereby there was no implied warranty of title to a chattel in a sale thereof, even by one in possession, is still the recognized rule in the case of real estate. And yet this process of expansion and adjustment has, particularly in recent years, made itself felt in the realm of property and the use one may make of his own.

Side by side from a very early period have existed two maxims relating to the subject. *Cujus est solum, ejus est usque ad coelum et ad infernos,* and *Sic utere tuo, ut alienum non laedas.* The courts have not always succeeded in harmonizing them.

Some have given too literal and too absolute a meaning to the first and have overlooked the second. These courts have said in effect that one may use his own land precisely as he pleases and the courts will not inquire into his motives. These two maxims must be harmonized. One is as much a part of the law as the other. They can be harmonized only by limiting the owner of property to a reasonable use thereof, where injury to other persons results from such use.

[6] 80 Va. 1.

The Doctrine of Reasonable Use.

Toward this doctrine of reasonable use of one's property recent decisions have been tending. As indicated above, the struggle has been waged about three subjects, the common heritage of mankind, percolating waters, air and light.[7]

It has been suggested that there is a distinction between the principles applicable to percolating waters and those applicable to air and light, but a convincing statement of that distinction is yet to be seen. It would seem that whatever ground there may have been for such distinction in the past has been removed by the abolition of the doctrine of ancient lights. Indeed, these elements have, in well reasoned cases, been classed together, as respects the principles of law applicable thereto.[8]

And yet with respect to percolating waters, the *rule of reason* prevails in the majority of American jurisdictions, while as to light and air the *rule of malice* is supported by the weight of authority, if mere number of decisions constitutes such weight. This singular fact is to be accounted for by the influence of the doctrine of ancient lights which still persists in spite of the fact that that doctrine has long since been repudiated in America.

The present state of the authorities on these subjects will now be briefly considered.

Percolating Waters.

One may sink a well on his own land and take therefrom for his own use and benefit the percolating waters beneath the surface; and if in so doing he lessens the flow in a neighbor's spring or well, it is *damnum absque injuria.* The old rule was

[7] Somewhat similar questions have arisen in recent years with respect to oil and natural gas. Hague *v.* Wheeler, 157 Pa. St. 324, 27 Atl. 714. Statutes prohibiting waste and regulating the taking of gas and oil from the soil are usually upheld as a valid exercise of the police power, because of the value of these commodities to the public. Townsend *v.* State, 147 Ind. 624, 47 N. E. 19; Ohio Oil Co. *v.* Indiana, 177 U. S. 190. Here the court adopts the analogy suggested in Westmoreland Natural Gas Co. *v.* De Witt, 130 Pa. St. 235, and classes oil and gas as minerals *ferae naturae.*

[8] Wheatley *v.* Baugh, 25 Pa. St. 528; Burke *v.* Smith, 69 Mich. 380, 37 N. W. 838; Barger *v.* Barringer, 151 N. C. 433, 66 S. E. 439.

that this right was absolute, regardless of motive or manner of use; and some courts still so hold.[9] But in the majority of jurisdictions the right must be exercised reasonably. Thus he may not do it with malicious motive;[10] nor merely to waste the water to the injury of his neighbor;[11] nor in unreasonable quantity or for unreasonable uses.[12]

In the case of Smith *v.* City of Brooklyn, [13] the court, while recognizing the usual rule as announced in previous New York decisions, denied the right of the City of Brooklyn to sink wells on its own property and by means of powerful pumps drain the sub-surface waters from adjoining lands, for the purpose of obtaining a public water supply. Realizing that the decision was in apparent conflict with prior decisions, the court says: "'So use your own property as not to injure another' is a maxim as old as civilized man, and binding both in law and morals. It may be saved and applied to percolating waters, and still support our prior decisions by placing the limitations upon it which reason and justice require."

This case was followed in Forbell *v.* City of New York,[14] a case similar in its facts. In the latter case the court in discussing the right of a landowner to take and use sub-surface waters, says:

> "He may make the most of it that he reasonably can. It is not unreasonable, so far as it is now apparent to us, that he should dig wells and take therefrom all the waters that he needs, in order to the fullest enjoyment and usefulness of his land as land, either for purposes of pleasure, abode, productiveness of soil, trade, manufacture, or for whatever else the land as land may serve. He may consume it, but must not discharge it to the injury of others. But to fit it up with wells and pumps of such pervasive and potential reach that from their base the defendant can tap the wa-

[9] Huber *v.* Merkel, *supra.*

[10] Greenleaf *v.* Francis, 18 Pick. 117; Chesley *v.* King, 74 Me. 164; Miller *v.* Black Rock Co., 99 Va. 747, 40 S. E. 27; Wheatley *v.* Baugh, *supra.*

[11] Barclay *v.* Abraham, 121 Iowa 619, 96 N. W. 1080; Stillwater Co. *v.* Farmer, 89 Minn. 58, 93 N. W. 907.

[12] Smith *v.* City of Brooklyn, 160 N. Y. 357, 54 N. E. 787.

[13] *Supra.*

[14] 164 N. Y. 522, 58 N. E. 644.

ter stored in the plaintiff's land, and in all the region thereabout, and lead it to his own land, and by merchandising it prevent its return, is, however reasonable it may appear to the defendant and its customers, unreasonable as to the plaintiff and others whose lands are thus clandestinely sapped, and their value impaired.

* * * * * * * * *

"We the more readily conclude to affirm because the immunity from liability which defendant claims violates our sense of justice. It seems to pervert just rules to unjust purposes. It does wrong under the letter of the law in defiance of its spirit."

LIGHT AND AIR.

By the English common law if one opened windows overlooking his neighbor's property, the latter had the right to erect barriers to obstruct the view; and his motives in doing so were wholly immaterial. But there was a reason for this which does not exist in this country. That rule was a necessary corollary to the doctrine of ancient lights, whereby one enjoying the uninterrupted use of a window for a given period—anciently from time immemorial but latterly for the period of twenty years—acquired an easement in the adjoining land which the owner could neither gainsay nor deny. Hence to open a window overlooking a neighbor's land was regarded as an encroachment, though no action lay therefor. The only remedy was to build a barrier opposite the offending window.[15] The adjoining proprietor not only had the right to erect such barrier; but was obliged to do so to protect the title to his land. This was the only method whereby he could prevent the user from ripening into a right.

The leading spite fence case in America was Mahan *v.* Brown,[16] decided in 1835. Here the plaintiff alleged that defendant in order to deprive her of the use and benefit of the windows on one side of her house, had erected along side thereof a fence fifty feet in height, and that it was done wantonly and maliciously and without benefit or advantage to himself, and for the sole purpose of injuring and annoying the

[15] 3 Camp. 80.

[16] 13 Wend. (N. Y.) 261.

plaintiff. The court assumed the existence in that state of the doctrine of ancient lights and rested its decision upholding the right to erect such structure solely upon the ground that it was necessary to prevent the user from ripening into a right, which the court supposed it would do in twenty years.

Savage, C. J., after stating the English doctrine of ancient lights, substantially as above set out, proceeds to reason thus:

> "The person who makes a window in his house which overlooks the privacy of his neighbor, does an act which strictly he has no right to do; although it is said no action lies for it. He is therefore encroaching, though not strictly and legally trespassing upon the rights of another. He enjoys an easement, therefore in his neighbor's property, which in time may ripen into a right. But before sufficient time has elapsed to raise a presumption of a grant, he has no right, and can maintain no action for being deprived of that easement, let the motive of the deprivation be what it may; and the reason is, that in the eye of the law he is not injured. He is deprived of no right, but only prevented from acquiring a right, without consideration, in his neighbor's property."

And this the learned Chief Justice supposed he would do in twenty years.

In 1838, three years after the case of Mahan *v.* Brown was decided the New York court repudiated the doctrine of ancient lights.[17] The same has been done in Virginia and that doctrine is probably not recognized today in a single American commonwealth.[18]

Effect of Abolition of the Doctrine.

With the abolition of the doctrine of ancient lights the foundation for the English rule was swept away. Since the user could never ripen into an easement no matter how long continued, the opening of overlooking windows could no longer be regarded as an encroachment. The windows being unobjectionable *per se,* that is, not opened or used for the purpose of annoying the neighbor, the latter no longer had the right to ob-

[17] Parker *v.* Foote, 19 Wend. 309.

[18] Tunstall *v.* Christian, *supra.*

scure them with barriers. The barrier which under the old rule served a useful and a necessary purpose, viz., the protection of the owner's title, became a useless and an unreasonable structure.

One erecting a building with windows opening toward the property of another in these circumstances acquires no interest in the land of the latter, and could never do so by mere user no matter how long continued. He has no right to the land, and no right to prevent its use for any legitimate purpose. But he has a right to the influx of light and air through those windows until such time as the adjoining proprietor may have occasion to use his land for some useful or beneficial purpose, at which time the right must, in case of conflict, yield to the superior right of the adjoining proprietor. As will be hereafter seen this is the modern doctrine.

The earlier American decisions and some of comparatively recent date continued to apply the rule of the English common law in all its rigor, apparently overlooking the fact that the reason on which it was founded has never existed here.[19] Nor have they ceased to cite Mahan *v.* Brown as authority, although as above shown, Parker *v.* Foote, in repudiating the doctrine of ancient lights, swept the foundation from under that case.

Modern Doctrine as to Light and Air.

In more recent times the courts have shown a tendency to depart from the rule of the early decisions and to apply the doctrine of reasonable use in cases involving unnecessary obstruction of light and air. The leading case on the subject is Burke *v.* Smith,[20] decided by the Supreme Court of Michigan in 1888. Morse, J., speaking for the court quotes with approval from Wheatley *v.* Baugh,[21] "Neither the civil law nor the common law permits a man to be deprived of a spring or stream of water for the mere gratification of malice. * * * The owner of land on which a spring issues has a perfect right to it

[19] Guest *v.* Reynolds, 68 Ill. 478; Letts *v.* Kessler, 54 Ohio St. 73, 42 N. E. 765; Saddler *v.* Alexander (Ky.), 56 S. W. 518; McCorkle *v.* Driskell (Tenn.), 60 S. W. 172; Metzger *v.* Hochrein, 107 Wis. 267, 83 N. W. 308; Koblegard *v.* Hale, *supra.*

[20] *Supra.*

[21] *Supra.*

against all the world except those through whose land it comes. He has even a right to it against them *until it comes in conflict with the enjoyment of their right of property,"* and proceeds:

> "I cannot see why this principle does not apply with equal force to air and light, which are more free, and less capable of confinement, than water; and when there is, as is in this state, no danger of a prescriptive right being acquired in windows, the reason assigned by Washburn and others for the distinction between the two elements, light and water, is not applicable. See Washb. Easem. 489; Mahan *v.* Brown, 13 Wend. 264. If a man has no right to dig a hole upon his premises, not for any benefit to himself or his premises, but for the express purpose of destroying his neighbor's spring, why can he be permitted to shut out air and light from his neighbor's windows, maliciously and without profit or benefit to himself. By analogy, it seems to me that the same principle applies in both cases, and that the law will interpose and prevent the wanton injury in each instance."

In reply to the argument that if one has a legal right, courts will not inquire into the motive by which he is actuated in enforcing it, the court said:

> "But it must be remembered that no man has a legal right to make a malicious use of his property, not for any benefit or advantage to himself, but for the avowed purpose of damaging his neighbor. * * * That courts have failed to apply the remedy has never been felt a reproach to the administration of the law; and the fact that the people have regarded this neglect of duty on the part of the courts so gross as to make that duty imperative by statutory law furnishes no evidence of the creation of a new right or the giving of a new remedy, but is a severe criticism upon the courts for an omission of duty already existing, and now imposed by statute upon them, which is only a confirmatory of the common law."

Campell, C. J., and Champlin, J., dissented. But the opinion was approved by a unanimous court in Flaherty *v.* Moran,[22] the personnel of the court having changed meantime and Champlin being then Chief Justice. The case has several times since

[22] 81 Mich. 52, 45 N. W. 381.

been unanimously approved by the same court though differently constituted as to personnel.[23]

It was approved and followed by the Supreme Court of North Carolina in 1909, in Barger *v.* Barringer;[24] by the Supreme Court of Alabama in 1912 in Norton *v.* Randolph;[25] by the Supreme Court of Nebraska in 1914, in Bush *v.* Mockett.[26]

In Norton *v.* Randolph,[27] the Supreme Court of Alabama referring to the earlier cases said: "The doctrine of these cases based on the alleged right of the owner of land to use it according to his malicious fancy, and without any advantage to himself or his land, for the sole purpose of injuring his neighbor in the lawful and benefical use of his adjoining property, has been carried to such an extent as in many cases to be justly characterized as 'odious.' "

And again, "but little else remains to be said in support of the rule of reason and good morals. But the rule of malice was, we think, conceived in error, and has indeed become a Caliban of the law—the ugly and misshapen offspring of a decent and honorable parentage—and we are unwilling to sanction in this jurisdiction its evil and odious sway."

In an illuminating address entitled "Law and Morals" by James Barr Ames, late Dean of the Harvard Law School,[28] the learned author after tracing the introduction and gradual development of the moral and ethical quality in the law, lays down a principle which in his judgment should govern in all such cases as this.

> "But unless exempted from liability by consideration of enlightened public policy, I can see no reason why he who has by his act willfully caused damage to another should not in all cases make either specific reparation or pecuniary compensation to his victim."

He mentions several different classes of wrongs including

[23] Kirkwood *v.* Finegan, 95 Mich. 543, 55 N. W. 457; Kuzniak *v.* Kozminski, 107 Mich. 444, 65 N. W. 275; Peek *v.* Roe, 110 Mich. 52, 67 N. W. 1080.

[24] 151 N. C. 433, 66 S. E. 439.

[25] 176 Ala. 381, 58 South. 283.

[26] 95 Neb. 552, 145 N. W. 1001, 52 L. R. A. (N. S.) 736.

[27] *Supra.*

[28] 22 HARV. LAW REV. 97. 110.

spite wells and spite fences, and expresses the opinion that the principle suggested would afford relief in all such cases and that its adoption by the courts is justified by the rules of equity and the Statute of Edward I.

Effect of Malice.

It is often said that "malicious motives cannot make that a wrong which in its own essence is lawful," and this supposed principle of law is invoked in support of all the decisions upholding spite fences and spite wells. But as was said in Chesley *v.* King,[29] this cannot be regarded as a maxim of universal application; and in two recent decisions in Virgina, the principle is recognized that malice may make that actionable which otherwise would be lawful.

Thus Miller *v.* Black Rock Co.[30] upholds the right of the owner of land to take therefrom sub-surface waters for all his legitimate needs, and without liability to the adjoining proprietor who is injured thereby; but strongly intimates that this must not be done maliciously or even negligently. In Meredith *v.* Triple Island Gunning Club,[31] it is held that one may, *without malicious motive,* and in the the exercise of the common right of hunting and fowling in Back Bay shoot wild fowl in these waters, and if damage results to the adjacent riparian owners through the intercepting of files of ducks and other game as they fly over the waters, thus preventing their coming within range of his land, it is *damnum absque injuria.* It is clearly to be inferred from the opinion that this legal right may not be exercised with malicious motive.

This Primarily a Question for the Courts.

It may be thought that this is a question for the legislature and not the courts. This position, however, is not sound. It is primarily a question of legal right, a right of property, and this is a judicial question. Once the courts recognize that the owner of land by virtue of his ownership has the *legal right* to use it maliciously to the needless damage of his neighbor—a

[29] *Supra.*
[30] *Supra.*
[31] 113 Va. 80, 73 S. E. 721.

right inhering in the nature of property—and the subject is beyond the reach of the legislature. No man may be deprived of his rights of property by a mere act of the legislature. Neither the police power nor the power of eminent domain will apply, since neither can be invoked for other than a public purpose; while the immediate object of any such legislation can only be the protection of a single individual or at most a small group of individuals. Precisely this objection has been urged, and in at least one case, successfully, against the legislation of this kind. The courts which recognize the *legal right* have found it extremely difficult to sustain such legislation.

In 1887 a statute was enacted in Massachusetts [32] declaring "any fence or other structure in the nature of a fence, unnecessarily exceeding six feet in height maliciously erected or maintained for the purpose of annoying the owners or occupants of adjoining property," to be a private nuisance, and giving the person injured a right of action therefor.

The constitutionality of the act was attacked in Rideout *v.* Knox,[33] but was upheld on grounds that can scarcely be regarded as satisfactory. In the course of his opinion, Holmes, J., expressed the view that at common law a man has a right to build a fence on his own land as high as he pleases, however much it may obstruct his neighbor's light and air, and intimates that the motive is immaterial. He further concedes that "to a large extent the power to use one's property malevolently in a way which would be lawful for other ends as an incident of property which cannot be taken away even by legislation." And although further conceding that the use which this statute was designed to prevent was not directly injurious to the public at large—yet upheld the law as a valid exercise of the police power on the ground that "there is a public interest to restrain this kind of aggressive annoyance of one neighbor by another, and to mark a definite limit beyond which it is not lawful to go."

A different conclusion was reached in the case of Huber *v.* Merkel.[34] Here the old doctrine was carried to its only logical

[32] St. Mass. 1887, c. 348.
[33] 148 Mass. 368, 19 N. E. 390.
[34] *Supra.*

result. The plaintiff in the court below relied upon a statute then in force, passed in 1901, which is as follows: "Where there are two or more artesian wells in any vicinity or neighborhood, one or more of which are operated or used by any person or owner of such well shall use due care and diligence to prevent any loss or waste or unreasonable use of any water therein contained, or flowing from the same as would deprive or unnecessarily diminish the flow of water in any artesian well to the injury of the owner of any other well in the same vicinity or neighborhood." The act further provides that for permitting the discharge of a greater quantity of water than is reasonably necessary for the use of such person so as to materially diminish the flow of the water in any other artesian well in the same vicinity, the owner shall be liable for the damage so caused.

The constitutionality of this act was attacked. On this question the appellate court reached the only conclusion it logically could reach. Having held that by the common law then in force in the state, the owner of the soil had the legal right wantonly and maliciously to waste sub-surface waters to the injury of his neighbors, it could not consistently do otherwise than hold that he could not be deprived of this legal right by an act of the legislature. As was pointed out in the opinion, the act "does not pretend to conserve any public interest. Upon its face its purpose is to promote the welfare of one citizen, by preventing his neighbor from using his property." Hence the court was perfectly logical in concluding that "The necessary result of the whole discussion is that the law in question cannot be held to be within the police power, and that it, in effect, takes private property for private use and without compensation."

Upon principles which are well settled, certainly in Virginia, private property cannot be taken for private use even if full compensation be made. Hence this legal right to injure one's neighbor under the guise of using one's own property—granted it be a legal right—is beyond the reach of the state itself.

It is conceded that for the sake of definiteness and uniformity legislation is desirable, but such legislation should not be sought on the theory that the courts are powerless to deal with

the subject. The point is, that the courts cannot consistently uphold this supposed right as a common law right of property and at the same time uphold a statute which takes it away. If the courts are powerless to give relief in such cases, then the legislature is also powerless.

It may be objected that the rule contended for would leave the question of the use one may make of his land to be determined according to the varying tastes or opinions of the court or jury in each particular case. There are, of course, practical difficulties in the application of the rule, but not more serious than in numerous other cases in which courts and juries are called upon to determine whether a given act is reasonable. The right of the owner to the fullest enjoyment of his property as such should in every case be recognized and upheld and at the same time adjoining proprietors should be protected against needless annoyance and damage.

Without presuming to lay down a rule of universal application, it is submitted that in all ordinary cases these results will be substantially achieved by recourse to the following principle. *A use which is inspired by malice and which is injurious to others than the owner, in order to be lawful, must be reasonable.* In the application of the rule a use should ordinarily be regarded as reasonable which is inherently capable of promoting or does promote the interest, convenience or happiness of the owner or is of benefit to the community, and doubts on this question should be resolved in favor of the use.

Thus understood and applied the rule would restrain only those uses of property which are injurious to others and owe their origin to a malicious motive, and then only when palpably devoid of benefit or advantage to the owner or plainly in excess of his reasonable requirements. At the same time it would afford relief in such cases as Huber *v.* Merkel,[35] and Hale *v.* Koblegard.[36]

VIRGINIA UNFETTERED BY LOCAL PRECEDENT.

As respects light and air the question is open in Virginia. The two Virginia cases above referred to have paved the

[35] *Supra.*

[36] *Supra.*

way for the adoption here of the modern doctrine based on the rule of reason. The common law is supposed to respond to public opinion and to reflect with more or less fidelity the moral and ethical sentiments of the poeple. It is, of course, too much to expect that law in the natural process of evolution should ever be fully abreast of public sentiment; but in all conscience it ought not to be several centuries behind the times.

Spite fences and spite wells are and long have been under the ban in all enlightened communities. Public opinion universally condemns them. It cannot be that the common law of Virginia as it exists today may be invoked in support of a use of property which the sentiments of her people universally condemn. If so, we shall need to revise our theory that the law is a progressive science.

H. H. Rumble.

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